

BEFORE THE
POSTAL REGULATORY COMMISSION

PERIODIC REPORTING
(PROPOSAL TWO)

: Docket No. RM2016-10
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**UNITED PARCEL SERVICE, INC.'S RESPONSE TO THE UNITED
STATES POSTAL SERVICE'S MOTION FOR CLARIFICATION OF
POSTAL REGULATORY COMMISSION'S ORDER GRANTING
ACCESS TO NON-PUBLIC MATERIALS FILED UNDER SEAL**

(October 25 , 2016)

United Parcel Service, Inc. ("UPS") respectfully responds to the United States Postal Service's ("Postal Service") Motion for Clarification regarding the Commission's recent order granting UPS access to certain non-public material filed by the Postal Service in support of Proposal Two. See Order Granting Motion for Access to Non-Public Materials Filed Under Seal ("Order"), Dkt. No. RM2016-10 (Oct. 11, 2016).¹ The Postal Service's Motion seeks "clarification" of the scope of the Commission's order granting UPS access to certain non-public materials. The Commission's Order, however, is clear and unambiguous and requires no clarification. As such, the Commission should deny the Postal Service's Motion and direct the Postal Service to execute the attached non-disclosure agreement which is consistent with the Commission's Order.

¹ The Postal Service filed this motion, without warning or notice, in the middle of its negotiations with UPS regarding the agreement ordered by the Commission.

ARGUMENT

On August 25, 2016, the Commission initiated a rulemaking proceeding to consider a Postal Service proposal relating to the treatment of carrier costs. PRC Dkt. No. RM2016-10, Order No. 3482 ("Order No. 3484") (August 25, 2016). In support of Proposal Two, the Postal Service relied extensively on non-public material filed under seal. As the Commission recognized, "Proposal Two does not contain public library references, tables, or data upon which commenters can rely in making comments." Order at 4. Thus, UPS filed a Motion for Access to this non-public material for certain of its outside consultants and lawyers. See United Parcel Service, Inc.'s Motion for Access, Dkt. No. RM2016-12 (Sept. 23, 2016). Ultimately, the Commission granted UPS's motion. See Order at 4. But the Commission required UPS and the Postal Service to reach an agreement "regarding additional legal protections . . . in the event of an inadvertent disclosure" of this material by UPS. *Id.*

The Commission specifically directed UPS to agree to indemnify the Postal Service in connection with the Postal Service's provision of the data. The Commission did not direct UPS to indemnify anyone else. Indeed, the Commission clearly and explicitly found that:

an agreement ***between UPS and the Postal Service*** regarding additional legal protections and indemnification in the event of an inadvertent disclosure will mitigate the concerns over adequate safeguards to protect the information.

Id. (emphasis added).

UPS has been standing ready to execute an agreement with the Postal Service that would indemnify the Postal Service against any legal claims brought in connection with the misuse by UPS of the data in the non-public files. At the urging of Canada

Post, however, the Postal Service has insisted that UPS also agree to indemnify not just Canada Post but an unspecified set of additional third parties whose information the Postal Service said is contained in the nonpublic data. This demand is unwarranted and unreasonable. The Commission did not direct UPS to agree to indemnify third parties and doing so would not make sense. UPS advised the Postal Service of this position over the course of several informal discussions in recent days, whereupon the Postal Service elected to file its “Motion for Clarification” without notice to UPS.

Although UPS is willing to indemnify the Postal Service for any claims brought against it arising from any improper disclosure of the non-public information, there is no justification for requiring UPS to indemnify third parties, identified or otherwise. In the unlikely event of a misuse of the data by UPS that somehow caused harm to Canada Post, for example, Canada Post could bring any legal claims arising from such harm directly against UPS. There is no legitimate risk of claims being brought *against* Canada Post.

UPS has already agreed to go above and beyond any traditional requirement to safeguard the commercially sensitive non-public information at issue in this docket. UPS has agreed to limit access to its outside consultants and counsel, each of whom has successfully handled non-public Postal Service information without incident on numerous occasions in the past, and each of whom has executed an agreement to keep the data confidential and use it only for evaluating Proposal Two. UPS has agreed to enter into a non-disclosure agreement with the Postal Service. It has even agreed to indemnify the Postal Service in the unlikely event of an improper disclosure. It would be grossly unfair to demand more than this of UPS — an interested party who simply

wishes to file informed comments regarding Proposal Two. The Commission has an established procedure that routinely and effectively balances transparency and privacy concerns. Demanding that qualified, trustworthy custodians of probative non-public data now indemnify third parties would cast doubt on the purpose and value of Commission's existing procedures, and chill public comment in the future on any similar proposal.

The mere fact that Proposal Two implicates international information, rather than purely domestic, should not insulate the proposal from scrutiny by interested parties or confer a veto right on the Postal Service's international customers. The Postal Service has a clear choice: it may disclose sufficient information to make meaningful public comments possible in the Commission's rulemaking dockets, or it may choose not to rely on non-public information so sensitive that no reasonable assurance suffices to safeguard the interests at stake. Having chosen to file Proposal Two, the Postal Service cannot impose unreasonable barriers to access by interested parties of the data necessary to evaluate the proposal.

Accordingly, the Commission should deny the Postal Service's Motion and should order the Postal Service (and only the Postal Service) to execute the attached non-disclosure agreement.

Respectfully submitted,

UNITED PARCEL SERVICE, INC.,

By: /s/ Steig D. Olson

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